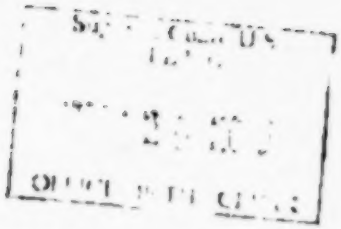

No. 09-1343

IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Due Process Clause permits a state court to exercise personal jurisdiction over an alien corporation that has aimed the marketing of its product equally at that state and other states, where the alien corporation's actions have resulted in injury within the state.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents the interests of its members in litigation and as amicus curiae.

Public Citizen has long worked to maintain the availability of the courts to provide remedies to individuals who suffer injuries caused by defective products. The ability of the courts to provide such remedies may be thwarted by unduly narrow conceptions of the circumstances in which courts may exercise authority over those who cause injuries within their territorial jurisdiction. In this case, the contention of petitioner J. McIntrye Machinery, Ltd. (McIntyre) that an alien corporation may engage in a concerted program of marketing directed at all fifty states without being subject to jurisdiction in *any* state (or at least not in 49 of them) when its products cause injury reflects precisely such a crabbed view of the scope of jurisdiction, and fails to give effect to the substantial interests of plaintiffs in having a forum in which to vindicate their rights under applicable law. Public Cit-

[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

izen therefore submits this brief to urge the Court to ensure that injured parties' interests in reasonable access to judicial remedies and the states' interests in providing such remedies are not sacrificed on the basis of unwarranted claims of unfairness to defendants who do business throughout the country.

STATEMENT

The briefs of the parties and the opinions below show that the dispositive facts are clear and undisputed, whatever disputes may remain around the margins. McIntyre is in the business of manufacturing and selling equipment for a specialized market, the metal recycling industry, including shearing machines for which it charges tens of thousands of dollars each. To serve the market for its products in the United States, McIntyre over time designated a series of exclusive distributors who, with McIntyre's assistance, sought to promote sales throughout the country—including New Jersey, where several of McIntyre's machines were sold.

At the relevant time here, McIntyre's U.S. distributor was McIntyre Machinery America, Ltd., a company that happened to be located in Ohio. A buyer in New Jersey ordered one of McIntyre's machines, which McIntyre shipped to the United States in response to the order as relayed by the distributor. The price of the machine was approximately $25,000, which McIntyre received (less the distributor's commission). As a result of the New Jersey customer's use of the machine for its intended purpose in the location to which McIntyre's U.S. distributor sent it, a citizen of New Jersey was seriously injured, allegedly because of the machine's defective design.

SUMMARY OF ARGUMENT

Sustaining the New Jersey courts' assertion of jurisdiction over McIntyre in this case is fully consistent with the principles that have governed this Court's personal jurisdiction doctrine since its decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *International Shoe*'s core requirement that a defendant have the minimum degree of contact with the forum state necessary to render the assertion of jurisdiction over it consistent with "traditional notions of fair play and substantial justice," *id.* at 316, is amply satisfied when, as in this case, an alien defendant has engaged in commercial conduct directed at creating a market for its products nationally, and that conduct has given rise to an injury within the bounds of the forum state.

This Court's decisions have emphasized that the consideration of "minimum contacts" is not a purely mechanical or quantitative analysis, but one that looks to whether the defendant's forum-directed activities are sufficient, in light of the state's legitimate interests in subjecting the defendant to jurisdiction. In other words, the minimum contacts analysis is not purely defendant-centric: its focus is on fairness to the defendant in relation to the forum state's interests, including its interests in protecting its residents. Here, and in similar cases involving alien corporations that market their products throughout the United States, the states have powerful interests in regulating the safety of those products and in providing remedies to residents whose injuries are the direct result of the corporations' forum-directed conduct. By contrast, an alien corporation has little or no legitimate liberty interest in *not* having to appear in any

particular state where its efforts to serve the national market have resulted in injury.

Accordingly, subjecting an alien corporation to personal jurisdiction in the circumstances here fully accords with notions of fair play and substantial justice. McIntyre embarked on a course of conduct aimed at serving the market for scrap-metal shearing equipment throughout the United States; it shipped a large and expensive piece of equipment for which it received a substantial payment in response to an order from a New Jersey buyer who responded to its national marketing efforts; and the use of the equipment by the New Jersey customer resulted in substantial injuries to a worker in New Jersey, allegedly as a result of McIntyre's defective design. These circumstances create a "relationship among the defendant, the forum, and the litigation," *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), that is ample to support the exercise of jurisdiction. Similar circumstances, moreover, are generally held to support jurisdiction in the emerging field of e-commerce. Of course, concerns of fairness and due process may preclude the assertion of personal jurisdiction in cases in which the occurrence of injury within the forum state is, from the defendant's standpoint, a fortuity unrelated to any actions that it could reasonably have understood would subject it to jurisdiction in that state. But this is not such a case.

ARGUMENT

I. States Have Strong Interests in Exercising Jurisdiction Over Alien Corporations Whose Business Activities Cause Injuries to The States' Residents and Workers.

Since this Court's decision in *International Shoe*, it has been settled that personal jurisdiction does not turn on the physical presence of a defendant in the forum state: "Jurisdiction ... may not be avoided merely because the defendant did not *physically* enter the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Rather, as the Court has repeatedly stated, the limits on the power of a state court to exercise personal jurisdiction over an out-of-state defendant are supplied by considerations of due process, under which a defendant must "have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316 (citation omitted). Put another way, there must be "such contacts of the [defendant] corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *Id.* at 317.

Although the requisite contacts must be the result of each defendant's own conduct, *see, e.g., Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980), *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), minimum contacts analysis does not focus on only the defendant's interests. Nor is the determination of minimum contacts a matter of "[m]echanical or quantitative evaluations of the defendant's activities in the forum." *Shaffer v.*

Heitner, 433 U.S. at 204. Rather, because the question is whether the defendant's activities are such as to make the exercise of jurisdiction over it *reasonable*, those activities must be considered in relation to the relevant interests of the forum state. As the Court put it in *International Shoe*, "Whether due process is satisfied must depend ... upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 319.

The Court elaborated on the significance of forum interests in determining whether a defendant's contacts suffice to render the exercise of jurisdiction fair and reasonable in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980):

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court*, ... 436 U.S. [84,] 92 [(1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer v. Heitner*, 433 U.S. [at] 211, n.37 ...; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko v. California Superior Court, supra*, 436 U.S., at 93, 98.

As the Court's citations in *World-Wide Volkswagen* indicate, consideration of state interests in determining whether a defendant's contacts are sufficient to make it fair to subject it to jurisdiction has been a persistent theme in the Court's personal jurisdiction decisions. Subsequent decisions have reinforced the theme. For example, in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), the Court observed that "the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." *Id.* at 775-76 (citing *World-Wide Volkswagen*, 444 U.S. at 292, and *McGee*, 355 U.S. at 223). Similarly, in *Burger King*, the Court emphasized the importance of the state's interests in determining whether the defendants' actions satisfied *International Shoe*'s "minimum contacts" criterion, *see* 471 U.S. at 473-74, and it explicitly stated that consideration of such interests may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477 (citing *Keeton*, 465 U.S. at 780, *Calder v. Jones*, 465 U.S. 783, 788-789 (1984), and *McGee*, 355 U.S. at 223-23).

The state interests implicated by the type of contact at issue here—where the defendant has targeted its sales of an allegedly defective piece of equipment at a national market including the forum state, and where injury has resulted in that state—are interests that this Court has traditionally recognized as very powerful. To begin with, a state has an undoubted interest in protecting both its residents and its workforce against serious injury. *See, e.g., Allstate Ins. Co.*

v. Hague, 449 U.S. 302, 313-14 (1981). Tort actions such as the one at issue here serve that interest by imposing standards of care (including, for example, the duty not to design or manufacture a defective product) on those who supply equipment used by workers within the state.

This Court has also recognized that states have a powerful interest in providing their residents compensation for injuries that they have suffered, and a corresponding interest in providing a forum in which residents may seek such remedies. As the Court stated in *McGee*, "It cannot be denied that [a state] has a manifest interest in providing effective means of redress for its residents .... These residents would be at a severe disadvantage if they were forced to follow [a defendant] to a distant State in order to hold it legally accountable." 355 U.S. at 223. Similarly, the Court has said it is "beyond dispute" that a state "has a significant interest in redressing injuries that actually occur within the State." *Keeton*, 465 U.S. at 776. In *Calder*, the Court found that the forum state's interest in remedying the "effects" of torts directed at its residents supported a finding that the defendant had sufficient minimum contacts. *See* 465 U.S. at 789. And in *Burger King*, the Court said that "[a] State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." 471 U.S. at 473.

Moreover, the Court recognized in *World-Wide Volkswagen* that the states have a "shared interest" in "furthering fundamental substantive social policies," and that the "interstate judicial system" as a whole has interests in the proper resolution of controversies. 444 U.S. at 286. Among those shared, inter-

state concerns is the common interest of the states in not allowing an alien corporation that has directed its actions toward an interstate market to evade responsibility for its actions in any of the states that make up that market. As the Court put it in *Burger King*, "where individuals 'purposefully derive benefit' from their interstate activities, ... it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." 471 U.S. at 474. The states thus have a powerful, shared interest in preventing a defendant from, as in this case, directing contact at all of them, but seeking to avoid being held accountable for its actions in any of them.

II. An Alien Corporation That Has Marketed Its Products Nationwide Has No Significant Liberty Interest in Avoiding Jurisdiction in a State Where Its Actions Have Resulted in Injury.

As this Court has explained, the due process requirement of minimum contacts to sustain the exercise of personal jurisdiction over a nonresident defendant exists to protect "individual liberty." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). As against the substantial interests supporting the exercise of personal jurisdiction over an alien corporation whose targeting of an interstate market including the forum state has caused injury within the state to a resident of the state, the alien corporation has relatively insubstantial (if any) legitimate "liberty interests" in avoiding suit.

To be sure, this Court has recognized that a defendant has an interest in not being subjected to personal jurisdiction "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Burger King*, 471 U.S. at 475. Thus, the Court held in *World-Wide Volkswagen* that a corporate defendant who took no action aimed at serving the market in a state could not be subjected to jurisdiction there based on a consumer's isolated, unilateral action in moving the defendant's product there. 444 U.S. at 295-96; *accord Asahi Metal Indus. Co. v. Super. Ct. of Calif.*, 480 U.S. 102, 110-12 (1987) (opinion of O'Connor, J.). Similarly, the Court has stated that "'[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" *Kulko*, 436 U.S. at 93-94 (quoting *Hanson v. Denckla*, 357 U.S. at 253).

Cases such as this one, however, do not involve contacts with the forum state that are merely "fortuitous" and thus not properly attributable to the defendant's own conduct and choices. Rather, in the words of this Court in *Hanson v. Denckla*, 357 U.S. at 253, McIntyre "purposefully avail[ed]" itself of the "privilege" of doing business with the forum state when it chose to sell its products through a distributor that targeted a national marketplace including New Jersey. That those activities resulted in a sale to a New Jersey customer (which in turn led to the injury giving rise to the action) was by no means "completely adventitious as far as [the defendant] was concerned." *Rush v. Savchuk*, 444 U.S. at 329. Rather, it was exactly the type of transaction that McIntyre intended to foster, in a jurisdiction that fell within the bounds of the market McIntyre sought to serve. No decision of this Court holds that a corporation has a "liberty

interest" in avoiding jurisdiction in such circumstances.

Moreover, the assertion of jurisdiction in such circumstances is entirely consistent with this Court's view that the rules governing personal jurisdiction provide "a degree of predictability ... that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. A company that chooses to designate a distributor to serve a market that includes some or all of the states of the Union can easily anticipate that it will be liable to suit in one of those states if its products cause injury there, and it can structure its conduct accordingly. Among other things, it can, as this Court suggested in *World-Wide Volkswagen*, "act to alleviate the risk of burdensome litigation by procuring insurance," *id.*—a step that McIntyre in fact took with respect to its American market, *see* Resp. Br. 4-5—and it can "pass[] the expected costs on to customers, or, if the risks are too great, sever[] its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297.

Moreover, any assertion that McIntyre or similarly situated alien corporations have a significant interest in avoiding the burdens of defending in one particular state as opposed to another is unconvincing. For more than half a century, this Court has acknowledged that "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for

disputes relating to such activity." *Burger King*, 471 U.S. at 474 (quoting *McGee*, 355 U.S. at 223).

From the standpoint of an alien corporation, moreover, it is difficult to see a difference of constitutional magnitude between the inconveniences of litigating in one American jurisdiction as opposed to another. To put it more concretely, New Jersey is no more or less convenient for McIntyre than Ohio, a jurisdiction where it could hardly proffer a reasonable claim that it lacked sufficient contacts to support personal jurisdiction in a lawsuit arising out of its sales of equipment to the American market. (Of course, it does not appear that McIntyre has admitted in this Court that it would even be amenable to suit in Ohio, where its American distributor was located. But if McIntyre's position is that it could not be sued even there, its claim would be still more untenable, amounting to the assertion that it had a liberty interest in avoiding litigation *anywhere* in the United States despite its substantial activities directed at maximizing its sales here.)

Indeed, as some scholars have observed, from the international perspective of an alien defendant, our nation's political subdivisions are largely irrelevant:

> In the international order, there is no such thing as Oklahoma. Oklahoma is an address, not a state. It is a fabled land in musical comedy, where the corn grows as high as an elephant's eye and wind goes sweeping across the plain. But it is just as mythical as Ruritania. It fields no army, sails no navy, prints no stamps and coins no money. Most important of all, it has no diplomatic relations and can conclude no treaties. In

> short, it lacks every single attribute of a 'state' for international purposes.

Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hastings L.J. 799, 813 (1988).[2] Thus, "[h]ow we choose to distribute our judicial business by either geography or by subject matter is our own business and, further, is a matter as to which Germany and Japan are profoundly disinterested." *Id.*

This is not to suggest, as some have, that the due-process-based minimum contacts doctrine be replaced with respect to alien defendants either by a doctrine focusing entirely on national contacts, *see id.*, or by some other construct altogether, *see, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1 (2006).[3] It is simply to recognize that an alien corporation has a minimal liberty interest, if any, in being subject to jurisdiction in one state rather than another when its commercial conduct has been directed without distinction towards both or, as here, towards all.

[2] New Jersey may be less fabled in song than Oklahoma (*but cf.* Bruce Springsteen, *Atlantic City* (1982)), but it is no more or less distinct from the United States as a whole from the standpoint of aliens and foreign states.

[3] A true "national contacts" approach would allow contacts specifically confined to, say, Alaska to support personal jurisdiction in Florida. The Court need not go so far to find that an effort to serve a national or multistate market that includes the forum state establishes minimum contacts with that state in a case arising out of an injury that occurs in the state as a result of the defendant's commercial activity.

III. New Jersey's Assertion of Personal Jurisdiction Over McIntyre Accords With This Court's Jurisprudence.

A realistic consideration of the interests at issue within the framework of this Court's minimum contacts jurisprudence can lead to only one result: When, as in this case, an alien corporation has, either directly or through a distributor, sought to serve a market that includes a particular state, it is properly subject to personal jurisdiction in that state when its commercial activity causes injury there. Personal jurisdiction is proper regardless of whether the alien corporation has singled that state out for particularly targeted marketing efforts; activity directed at a multistate market that includes the forum state is sufficient.

Given that this result follows so naturally from the general principles articulated in the Court's decisions and from the interests that the Court has recognized on both sides of the equation, it is not surprising that the Court has, more than once, explicitly stated that activity such as that involved here satisfies the minimum contacts standard. In *World-Wide Volkswagen*, for example, the Court stated straightforwardly that "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." 444 U.S. at 297 (emphasis added).

Similarly, in *Asahi*, Justice O'Connor's opinion acknowledged that minimum contacts are present

where an alien manufacturer has engaged in "conduct ... indicat[ing] an intent or purpose to serve the market in the forum State," including "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." 480 U.S. at 112. Nothing either in Justice O'Connor's opinion or in logic suggests that the defendant's undertaking with its distributor to "serve the market in the forum State" must specifically identify each state served, as opposed to a broader multistate or national market including the forum state. Justice Brennan's opinion in *Asahi* similarly would find the minimum contacts standard satisfied under these circumstances by "the regular and anticipated flow of products from manufacture to distribution to ... sale," *id.* at 117, as would Justice Stevens' opinion, *see id.* at 122.[4]

Likewise, in *Keeton*, the Court emphasized that the defendant had developed a product (there, a publi-

[4] It is therefore not necessary for the Court in this case to choose between the so-called "stream of commerce plus" standard that some have derived from Justice O'Connor's opinion and the standard set forth in Justice Brennan's opinion. Indeed, the label "stream of commerce" does not seem particularly apt or helpful as applied to this case, insofar as it conjures up an image of a defendant simply casting a product adrift and relying on chance to determine where in the global economy it may wash ashore. The conduct at issue in this case is much more directed: The defendant, far from simply releasing its product into an undifferentiated stream of commerce (or, as in *Asahi*, selling it to someone to be incorporated in another product that will be marketed at the sole discretion of the second manufacturer), has delegated a distributor to develop, and act as its exclusive sales agent in, a designated market to which the defendant then ships its product in response to orders generated as a result of this concerted plan to serve the relevant market.

cation) "aimed at a nationwide audience." 465 U.S. at 781. The Court found "no unfairness in calling [the defendant] to answer" for its conduct wherever in that nationwide market a substantial sale of its product caused an injury. *Id.* So, here, where McIntyre's efforts to serve a nationwide market led to a lucrative sale of its product to New Jersey, which in turn resulted in a serious injury there, there is no unfairness in calling it to answer for its conduct in a New Jersey court.

Applying the principles of this Court's decisions, lower state and federal courts have regularly held that a state may (consistently with both *World-Wide Volkswagen* and each of the opinions in *Asahi*) exercise personal jurisdiction over an alien or out-of-state corporation that, through a distributor, targets a multi-state or national market including the forum state, when that commercial activity has resulted in injury within the forum state.[5] As the Eighth Circuit put it

[5] A by no means exhaustive list of decisions fitting this pattern (many of which cite other, similar decisions) includes. *Clune v. Alimak AB*, 233 F.3d 538 (8th Cir 2000); *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir. 1999); *Vandelune v. 4B Elevator Components Unlimited*, 148 F.3d 943 (8th Cir. 1998); *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994), *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed Cir 1994); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F 2d 1534 (11th Cir. 1993); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986); *GSK Technologies, Inc. v. Schneider Elec., S.A.*, 2007 WL 788343 (E.D. Tex March 14, 2007); *Kaplan v. DaimlerChrysler, A.G.*, 99 F. Supp. 2d 1348 (M.D. Fla. 2000); *Stokes v. L. Geismar, S.A.*, 815 F. Supp. 904 (E.D. Va. 1993); *Felty v Conaway Processing Equip. Co.*, 738 F Supp. 917 (E.D. Pa. 1993); *Hicks v. Kawasaki Heavy Indus.*, 452 F. Supp. 130 (M D. Pa. 1978); *Le Manufacture Francaise des Pneumatiques Michelin v. Dist. Ct.*, 620 P.2d 1040 (Colo 1980),

(*Footnote continued*)

in one such opinion, "it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in [the plaintiffs'] home states." *Barone*, 25 F.3d at 615.

Recent cases involving the emerging field of e-commerce reflect a similar approach to the jurisdictional consequences of deliberate efforts by out-of-state corporations to serve national or multi-state markets. As the Seventh Circuit recently concluded in one such case, "due process is not violated when a defendant is called to account for the alleged consequences of its deliberate exploitation of the market in the forum state." *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 423 (7th Cir. 2010). There, the court found that an internet company that had intentionally limited its physical presence to Arizona had minimum contacts with Illinois because of its targeting of a national market, including Illinois. *See id.* at 427.

As the *GoDaddy* decision illustrates, the "exploitation of the market in the forum state" that makes the exercise of personal jurisdiction fair and reasonable is not limited to circumstances where the defendant *specifically* targets its marketing at a particular state. Although there was "no evidence that GoDaddy specifically targets Illinois customers in its advertising," the court held that "what mattered," as in this Court's decision in *Keeton*, was that the defendant "purposefully directed its business activities toward [the forum state] just as it had toward all other

Etchieson v Central Purchasing, LLC, 232 P.3d 301 (Colo. Ct. App. 2010); *Thompson v. Nishimoto Trading Co.*, 689 N.Y.S.2d 858 (Sup. Ct. 1999).

states." *Id.* at 428. That the forum state was "a place of no *particular* interest" to the defendant, *id.* (emphasis added), the court held, did not make it unfair to hale the defendant into court there because the claim was related to the forum-targeted activity, which provided the necessary minimum contacts. *See id.* at 429-31.[6]

The *GoDaddy* case also illustrates that where a defendant has sought to serve a commercial market that includes the forum state, the defendant's lack of control over (or even interest in) the location of particular customers who respond to its marketing efforts does not mean that the forum state's effort to exercise jurisdiction is contrary to this Court's condemnation of jurisdiction based on "unilateral" actions of persons other than the defendant. *See id.* at 428-29. The conduct of the defendant itself that is essential to the exercise of personal jurisdiction can be found in its establishment of a mechanism to distribute its products in a market including the forum state. Even when it exercises no further choice about what particular customers within that market it will serve, its contacts with the forum "cannot fairly be described as random, fortuitous, or attenuated." *Id.* at 429.

[6] As courts have recognized, the matter is different when a defendant's internet activity is limited to speech that, while it may be accessible anywhere in the nation (or the world) is not accompanied by efforts by the defendant to avail itself, directly or indirectly, of the benefits of the commercial marketplace in the forum state and is not otherwise targeted at that state. *See, e.g., Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

IV. Limiting the States' Exercise of Personal Jurisdiction Over Cases Such as This One Would Have Significant Adverse Consequences.

Declining to permit the exercise of jurisdiction over an alien or out-of-state corporation that has targeted the forum state as part of a nationwide or multistate market would have severe negative consequences for the administration of justice. It would reward artifices designed to allow exploitation of the benefits of doing business with residents of the state, while avoiding the consequence of being called to answer there for any wrongs arising out of that forum-directed conduct. As one court recently explained, holding that the use by alien corporations of distribution chains aimed at regions or the entire nation rather than at particular states did not establish minimum contacts with any of the targeted states "could allow any foreign-nation manufacturer that marketed and sold its products throughout the United States to avoid being haled into a state court anywhere in the country, thus impairing the states' ability to protect their respective citizens from injury from defective products, simply by refusing to tailor its product specifically to any state." *Etchieson v. Central Purchasing, LLC*, 232 P.3d at 307.

Denying personal jurisdiction here would also unfairly relegate the plaintiffs in this case, and potentially large numbers of other cases, to the choice of suing in a distant and inconvenient domestic forum (assuming that the alien corporation's contacts with the state where its domestic distributor was located would subject it to jurisdiction there), or to the daunting and doubtful prospect of pursuing litigation overseas. The

problem would be magnified if, as in this case, the alien corporation used a thinly capitalized and ultimately insolvent domestic corporation as its distributor, thus impairing the ability of potential plaintiffs to find a domestic defendant who could satisfy their claims in a more accessible forum.

Holding that a physically absent defendant's successful effort to serve a nationwide marketplace does not suffice to establish personal jurisdiction in particular states where customers have responded to the defendants' marketing efforts could also impair efforts to provide reasonable remedies for consumers in the burgeoning area of e-commerce. In that arena, many defendants could claim (as does McIntyre) that they neither knew nor cared which states particular customers hailed from, even though (like McIntyre) they set up a marketing method calculated to reach a national market.[7] The Court should not develop new limitations on personal jurisdiction that encourage efforts to evade legal accountability.

On the other side of the coin, nothing in a decision recognizing the availability of personal jurisdiction over an alien corporation in the circumstances of this

[7] Narrowing personal jurisdiction doctrine to preclude jurisdiction based on a defendant's effort to serve a multistate market including the forum state would call into question the emerging consensus in the e-commerce realm that commercially interactive websites generally support the exercise of personal jurisdiction in the plaintiff's home state if that state was part of the market served by the site. By contrast, mere internet speech not aimed at availment of the benefits of commercial activity in the forum state generally does not support personal jurisdiction. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *see also supra*, n.6.

case threatens to lead to unfair or burdensome forum-shopping by plaintiffs. Absent the more extensive contacts necessary to give rise to general personal jurisdiction, the availability of personal jurisdiction will remain limited to circumstances where the defendant took actions aimed at serving a market including the forum state *and* the claim at issue has a relationship to the forum-directed activity. Here, for example, the claim involves the occurrence in the forum state of an injury to a resident of that state—an injury that, in turn, was the result of the sale of the defendant's product to a company residing in the forum state.[8] A lawsuit brought in the plaintiffs' home state on the basis of an injury that occurred there can hardly be described as forum-shopping. And in any event, despite the widespread acceptance among the lower courts of the availability of personal jurisdiction in similar suits over the past several decades, newly reported data shows that the number of claims brought by domestic plaintiffs against alien defendants in the federal courts has (in striking contrast to the total number of lawsuits), *declined* in recent years—hardly evidence of a rash of forum-shopping. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596280##.

In the end, plaintiffs here seek to hold a defendant who successfully targeted a market including the fo-

[8] In this respect, the exercise of specific personal jurisdiction here is entirely unlike the North Carolina courts' exercise of general personal jurisdiction in *Goodyear Luxembourg Tires, S.A. v. Brown*, No. 10-76.

rum state accountable in the courts of that state for an injury that occurred there as a direct result of the sale of the defendant's product there. As this Court said in *Keeton*, there is nothing unfair about that. 465 U.S. at 781. The "traditional notions of fair play and substantial justice" that have animated this Court's personal jurisdiction decisions since *International Shoe*, 326 U.S. at 316, strongly support permitting the plaintiffs to sue in their chosen forum.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed, and the case remanded for further proceedings on the merits.

Respectfully submitted,

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